

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>HAULING FREIGHT LINES, INC.</b>	:	ORDER
	:	DTA NO. 820354
for Revision of a Determination or for Refund of	:	
Highway Use Tax and Tax on Fuel Use under Articles	:	
21 and 21A of the Tax Law for the Period October 1,	:	
1995 through September 30, 1999.	:	

---

Petitioner, Hauling Freight Lines, Inc., 8588 Erie Road, Angola, New York 14066, filed a petition for revision of a determination or for refund of highway use tax and tax on fuel use under Articles 21 and 21A of the Tax Law for the period October 1, 1995 through September 30, 1999.

On June 14, 2005, the Division of Taxation, by its representative, Christopher C. O' Brien, Esq. (Jennifer A. Murphy, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact. The Division of Taxation submitted the affirmation with exhibits of Jennifer A. Murphy, Esq., dated September 30, 2005, the affidavit with exhibits of Robert Farrelly, sworn to June 1, 2005, and the affidavit with exhibits of Bruce Peltier, sworn to June 3, 2005, in support of its motion. Petitioner's representative, Gary D. Borek, Esq., filed a Memorandum in Opposition to Respondent's Motion for Summary Determination on October 30, 2005, which date commenced the 90-day period for the issuance of this determination. After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

***FINDINGS OF FACT***

1. Petitioner, Hauling Freight Lines, Inc., filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of notices of determination L-017372875 and L-017426003.

2. Petitioner’s request for conference lists the following as its address:

Hauling Freight Lines, Inc.  
8588 Erie Rd  
Angola, NY 14006-9618

3. Petitioner’s request for conference also lists the following as its representative’s name and address:

Kevin M. Karr  
KM Karr Consulting, Inc.  
5 Park Place  
Silver Creek, NY 14136

4. Petitioner’s representative appeared at the conciliation conference held on July 17, 2001 on behalf of petitioner.

5. BCMS subsequently issued a Conciliation Order to petitioner (CMS No. 179778) dated January 31, 2003, which recomputed notices of determination L-017372875 and L-017426003 to tax due of \$3,021.42 and \$45,906.60, respectively, plus interest.

6. As petitioner failed to protest the issuance of the Conciliation Order within 90 days, the liability set by the order became fixed and eligible for collection. On November 24, 2003, warrant E-011107079-W003 was docketed for notice L-017372875 in the amount of \$4,588.66

and warrant E-011107079-W004 was docketed for notice L-017426003 in the amount of \$84,368.64.

7. The liabilities were paid by levies on petitioner's bank account on January 13, 2004 and July 27, 2004, and the warrants were recorded as satisfied on March 10, 2004 (E-011107079-W003) and on September 15, 2004 (E-011107079-W004).

8. Petitioner filed a Claim for Refund on September 27, 2004 in the amount of \$89,914.04, citing the two warrants as the basis for the refund claim.

9. By letter dated October 14, 2004, the Division of Taxation ("Division") informed petitioner that its claim for refund was being returned as it was not a proper refund claim under section 513 of the Tax Law. The Division stated in its letter that the return of petitioner's "claim" did not "constitute a denial" which would afford petitioner hearing rights under Tax Law § 2006(4).

10. On January 12, 2005, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the denial of its claim for refund.

11. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service ("USPS") certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record ("CMR").

12. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferees for signature, who in turn, forward the orders and covering letters to a BCMS clerk assigned to process the conciliation orders.

13. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit ("AFP"). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

14. The AFP Unit also produces a computer-generated CMR entitled "Assessments Receivable, Certified Record for Presort Mail." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

15. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

16. On the last page of the CMR the BCMS clerk stamps "POST OFFICE Hand Write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT."

17. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "1/31/03" is written in the upper right corner of each page of the CMR.

18. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

19. The five-page CMR contains a list of the conciliation orders assertedly issued by the Division on January 31, 2003. This CMR originally listed 48 certified control numbers and pieces of mail; however, the number of certified control numbers and pieces of mail received at the post office shows 46 in order to reflect the fact that two pieces of mail had been "pulled" from the mailing record. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number, the name and address of the addressee, and postage and fee amounts.

20. A piece of mail may be "pulled" for any number of reasons including, but not limited to, a discrepancy in the name or address. Any piece of mail so "pulled" will be segregated from the remaining group of orders for correction or issuance at a later time.

21. A review of the certified mail record in this matter reveals that two pieces of mail were "pulled." The pieces of mail that were "pulled" are listed on page two of the CMR. A line was placed through each of the entries for these taxpayers by the clerk after the orders were "pulled." It is noted that no such mark is made on or near the listing for petitioner or its representative. The clerk then changed on page 5 the total pieces and amounts listed from "48" to "46."

22. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9739 0153 5584 is reference/CMS number 000179778, along with the following address:

Hauling Freight Lines, Inc.  
8588 Erie Road  
Angola, NY 14006-9618

23. Page four of the CMR also contains information regarding a conciliation order issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002 9739 00153 5591 is reference/CMS number 000179778 along with the name and address of petitioner's representative as follows:

Kevin M. Karr  
5 Park Place  
Silver Creek, NY 14136

24. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

25. In this particular instance, the postal employee affixed a postmark dated January 31, 2003 to each page of the five-page CMR. The postal employee also wrote his or her initials and circled the number "46" contained on page 5 of the CMR where it states "total pieces received at post office."

26. The CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

27. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on January 31, 2003, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Hauling Freight Lines, Inc., 8588 Erie Road, Angola, NY 14006-9618 and a piece of certified mail addressed to Kevin M. Karr, 5 Park Place, Silver Creek, NY 14136, to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on January 31, 2003 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner and its representative on January 31, 2003.

### ***CONCLUSIONS OF LAW***

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the

existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Generally, with exceptions not relevant here, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309).

C. A petition contesting notices of determination of highway use tax due must be filed within 90 days after the date of mailing of the notices (Tax Law § 510). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A petition contesting notices of determination of tax on fuel use due must be filed within 30 days after the date of mailing of the notices (Tax Law § 528[a]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 30 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of



the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of DeWeese, supra*).

D. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. The affidavits of two Division employees, Robert Farrelly and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Farrelly and Peltier affidavits were followed with respect to the Conciliation Order issued to petitioner and its representative. Petitioner's and its representative's names, addresses and the CMS No. appear on page four of the certified mail record which bears a USPS date stamp of January 31, 2003 along with the initials of a Postal Service employee. There are 46 certified control numbers listed on the CMR, and the USPS employee indicated that he received 46 items for mailing. The Division has, therefore, established that it mailed the Conciliation Order to petitioner and its representative by certified mail on January 31, 2003 (*Matter of DeWeese, supra*).

F. The petition was filed on January 12, 2005. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

G. Tax Law § 510, applicable to highway use tax, provides, in relevant part, as follows:

In case any return filed pursuant to this article shall be insufficient or unsatisfactory to the commissioner of taxation and finance, or if no return is made for any period, the commissioner of taxation and finance shall determine the amount of tax due from such information as is available to the commissioner . . . . The commissioner of taxation and finance shall give notice of such determination to the person liable for such tax. Such determination shall finally and conclusively fix such tax, unless the person against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing . . . .

Tax Law § 528(a) provides that a notice of determination of tax on fuel use shall finally and conclusively fix such tax unless the person against whom it is assessed shall within 30 days after the giving of notice of such determination, petition the division of tax appeals for a hearing.

H. Tax Law § 513, applicable to highway use tax, provides, in relevant part, as follows:

Whenever the commissioner shall determine that any monies received under the provisions of this article were paid in error, he may cause the same to be refunded or credited, with interest . . . . Such monies received under the provisions of this article which the commissioner shall determine were paid in error, may be refunded or credited . . . provided an application therefor is filed with the commissioner within four years from the time the erroneous payment was made . . . .

Tax Law § 524(d) provides that a refund of tax on fuel use may be refunded or credited provided an application is filed with the commissioner within four years from the time the erroneous payment was made.

The term "payment" is not defined in the relevant statute or the regulations. However, the Federal courts, in interpreting Internal Revenue Code § 6511(a), dealing with the period of

limitation for the filing of claims for credit or refund, have held that for purposes of statute of limitations for refund based upon the filing of a claim, payment means the remittance that satisfies an asserted tax liability (*Consolidated Edison Co. of New York v. United States*, 941 F Supp 398), and that where a tax levy is involved, the tax is considered paid when the last payment is made through such tax levy (*Qureshi v. IRS*, 94-2 US Tax Cas ¶ 50346).

I. Applying the Federal interpretation of the term “payment” to the present matter, it is concluded that payment was made by petitioner on January 13, 2004 for Notice of Determination L-017372875 and on July 27, 2004 for Notice of Determination L-017426003. As petitioner filed its claim for refund on September 27, 2004 with the Division, such claim is timely within the requirements of Tax Law § 513.

J. The Division of Taxation argues that prior to the amendment of Tax Law § 1138(a)(1) by chapter 267 of the Laws of 1996, Tax Law § 1138(a)(1) contained similar language to that contained in Tax Law §§ 510 and 528. Tax Law § 1138(former [a][1]) provided that a notice of determination shall finally and irrevocably fix the tax unless the person assessed, within 90 days after receiving notice of such determination, shall apply to the Division of Tax Appeals for a hearing, or the commissioner, on his own motion, shall redetermine the same. Tax Law former § 1139(c) provided that a taxpayer was not entitled to a refund or credit which had been determined to be due where all opportunities for administrative and judicial review have been exhausted with respect to the determination. When a taxpayer failed to timely protest a notice of determination, the notice became an assessment subject to collection by the Division. The subsequent payment by a taxpayer, such as by a bank levy, of the amount due, followed by an application for a refund of that payment, did not revive an untimely protest of the original assessment. A taxpayer’s failure to file a timely protest against a tax determined to be due

pursuant to Tax Law former § 1138 precluded the opportunity to later challenge such tax by payment and subsequent refund claim. The Division's position that current Tax Law §§ 510, 513 and 528 deny petitioner the opportunity to pay the tax and then request a refund as former Tax Law §§ 1138(a)(1) and 1139(c) did is unpersuasive.

K. Under Tax Law former §§ 1138 and 1139(c), a tax determined pursuant to Tax Law § 1138 (i.e., assessed via a notice of determination) became a fixed and final assessment not subject to review, and hence not subject to refund, where "all opportunities for administrative and judicial review . . . have been exhausted with respect to such determination." That is, the failure to file a timely protest against a tax determined pursuant to Tax Law § 1138 foreclosed the opportunity to challenge such tax, whether by payment and claim for refund thereof, or otherwise. In contrast, Tax Law § 513 allows for a credit or refund of an overpayment of tax where a claim is made therefor within four years from the time the tax was paid. There is no restriction in Tax Law § 513 which denies review where there was an opportunity for administrative review. Petitioner can pay its outstanding assessment and file a claim for refund of such payment within four years thereafter. In turn, a denial of such claim can be protested and heard on the merits. It was the interplay between Tax Law former § 1138(a)(1) and former § 1139(c) which precluded a taxpayer from challenging a tax determined to be due by paying the tax and then filing a refund claim where the taxpayer had the opportunity for administrative and judicial review but failed to timely protest the statutory notice. As the language of Tax Law § 513 contains no such restriction relating to administrative review, petitioner is entitled to a hearing on the merits of its refund claim (Tax Law § 2006[4]).

L. The Division's motion for summary determination is denied; and this matter shall be scheduled for a hearing on the merits as soon as practicable.

DATED: Troy, New York  
January 12, 2006

---

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE